Supreme Court, U. S.
FILED
SEP 19 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

1978 TERM

---

NO. 78-5422

FEDERICO GONZALEZ,

Appellant,

-against-

NEW YORK.

---

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT.

---

# JURISDICTIONAL STATEMENT

---

WILLIAM E. HELLERSTEIN
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038
(212) 577-3420
Counsel for Appellant

BRENT K. OLSSON
Of Counsel

IN THE

SUPREME COURT OF THE UNITED STATES

1978 TERM

---

NO.

---

FEDERICO GONZALEZ,

Appellant,

-against-

NEW YORK.

---

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT.

---

## JURISDICTIONAL STATEMENT

Federico Gonzalez, appellant herein, respectfully appeals from a judgment of the Appellate Division of the Supreme Court of New York, Second Department, entered May 8, 1978, affirming a judgment of the Supreme Court, Kings County, rendered on July 30, 1975, convicting him of criminal possession of a dangerous drug in the third degree [formerly New York Penal Law §220.20 (McKinney, 1972)] and sentencing him to an indeterminate term of imprisonment with a maximum of five years. Appellant submits this statement to show that this Court has jurisdiction of this appeal and that a substantial question is presented.

## CITATION TO OPINION BELOW

The affirmance by the Appellate Division, Second Department, merely citing New York Criminal Procedure Law Sections 140.15(4) and 120.80(5) as an opinion, is not yet officially reported. The order of affirmance is annexed as Appendix A. Leave to appeal to the New York Court of Appeals was denied on June 21, 1978, by Chief Judge Charles D. Breitel. A copy of the certificate denying leave to appeal to the Court of Appeals is annexed as Appendix B. The trial court's written opinion denying appellant's motion to suppress is annexed as Appendix C.

## JURISDICTION

The judgment and order of the Appellate Division was entered on May 8, 1978. Leave to appeal to the Court of Appeals was denied on June 21, 1978.

A notice of appeal to this Court was filed in the Supreme Court, Kings County, the court possessed of the record, on September 15, 1978. The notice of appeal is annexed as Appendix D. This Court's appellate jurisdiction is invoked under 28 U.S.C. §1257(2). The following decisions sustain the jurisdiction of the Court to review the judgment of the New York Court of Appeals. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61 n. 3 (1963); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 288-90 (1921).

## QUESTION PRESENTED

Whether Section 140.15(4) of the New York Criminal Procedure Law which authorizes the police to make warrantless arrests of a person within a home is, as applied to this case, violative of the Fourth and Fourteenth Amendments.

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments IV, XIV.

## STATUTES INVOLVED

New York Criminal Procedure Law, Section 140.15(4):

Arrest without a warrant; when and how made by police officer.

* * *

4. In order to effect such an arrest, a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80 [relating to matters of notice to occupants before entry], if he were attempting to make such arrest pursuant to a warrant of arrest.

## STATEMENT OF THE CASE

Appellant and his three co-defendants, Anthony Lugo, Julio Tablas, and Carlotta Verges, were arrested within an apartment and indicted in three counts charging criminal sale and possession of a dangerous drug in the first degree and conspiracy in the third degree.* A joint motion by appellant and Lugo to suppress the cocaine which was seized in the apartment pursuant to the arrests was denied on May 19, 1975.

At the suppression hearing, the People's witnesses testified that the arrests of appellant and his co-defendants on December 14, 1972 were the culmination of an undercover drug investigation begun in October, 1972 which had already produced several small cocaine sales by Tablas to an undercover officer, Detective Saul Rodriguez. Rodriguez had previously arranged to purchase approximately one-half kilogram of cocaine from Tablas, and by 2:50 P.M. on December 13, 1972, in anticipation of the sale, he and his field team (consisting of at least ten officers) had positioned themselves in the vicinity of 17 Woodhull Street, where the arrests were to occur. Throughout the afternoon and early evening, Detective Rodriguez, Tablas, and Verges met several times to discuss the upcoming sale: at one point, Rodriguez heard Verges tell Tablas "Freddy" could get the cocaine. Rodriguez met his field team at least once in their office to explain that a delay was necessary to arrange the sale.

At 9:05 P.M., Rodriguez entered the second-floor apartment at 17 Woodhull Street pursuant to an arrangement with Tablas and Verges to discuss the cocaine sale with them and with appellant and Lugo, whom he was meeting for the first time. Appellant displayed and offered to sell to Detective Rodriguez a package containing one-eighth kilogram of cocaine,

* New York Penal Law: formerly §§220.44 and 220.23 (McKinney, 1972); §105.05.



but Rodriguez demanded five-eighths kilogram,* and was told to return in "about one hour and forty-five minutes."

Rodriguez left the apartment at 10:10 P.M., and informed the field team in his office that the cocaine would be at the apartment when he returned. Police Officer John Keller and a portion of the field team returned to the vicinity of 17 Woodhull Street at 11:45 P.M., having made no effort to obtain a warrant either for the arrest of the four co-defendants or to search the apartment.** When Rodriguez returned to the apartment at 12:15 A.M., December 14, 1972, he was shown five-eighths kilogram of cocaine, including the original one-eighth kilogram package.

Tablas and Rodriguez left the apartment to get the purchase money. Once outside the building, Rodriguez gave the field team a pre-arranged signal which directed them to enter the apartment to make the arrests and to seize the cocaine which they would find within. The field team burst into the building while Rodriguez and Tablas were still standing in the hallway. In the ensuing effort to arrest Tablas, Rodriguez' gun was discharged. The officers announced their purpose and demanded to be let into the apartment. When there was no response, they smashed down the door with a sledgehammer and entered at 12:55 A.M.

Appellant was immediately arrested within the bathroom, and a bag of cocaine seized from the running toilet. The officers then opened the bedroom door, arrested Lugo, and seized from beneath the bed a foil packet containing a white

* Sale of 1/8 kilogram (approximately 4 1/2 ounces) was then a Class C felony [formerly New York Penal Law §220.35 (McKinney, 1972)], punishable by a maximum of fifteen years [New York Penal Law §70.00]. Sale of 5/8 kilogram (approximately 22 ounces) was then a Class A felony [formerly New York Penal Law §220.44 (McKinney, 1972)], punishable by a mandatory maximum of life imprisonment [formerly New York Penal Law §70.00 (McKinney, 1967)].

** Keller attempted to excuse this failure by claiming that, up until the last moment, it was only a possibility, not a certainty, that the sale would occur within the apartment.

substance. Verges was arrested within the kitchen. Although it does not appear from the record whether any contraband other than that mentioned above was found or seized, a complete and thorough warrantless search of the apartment was made after the co-defendants were removed.

The court denied the motion to suppress, concluding, first, that the officers had probable cause to effect the arrests, and second, that in order to prevent the destruction of contraband, the forced, warrantless entry into the defendants' dwelling was appropriate and lawful (App. C). Appellant pleaded guilty to criminal possession of a dangerous drug in the third degree [formerly New York Penal Law §220.20 (McKinney, 1972)] on June 10, 1975, and was sentenced on July 30, 1975 to an indeterminate period of imprisonment not to exceed five years.*

By virtue of New York Criminal Procedure Law §710.70(2), appellant's plea of guilty did not waive his Fourth Amendment claim. He accordingly appealed the denial of his motion to suppress, and challenged the constitutional validity of C.P.L. §140.15(4) which authorized his warrantless arrest within the apartment. The Appellate Division, Second Department, affirmed the conviction on May 8, 1978, stating merely that the judgment of July 30, 1975 was "affirmed (see C.P.L. §140.15, subd. 4, 120.80 subd. 5)" (App. A). Leave to appeal to the Court of Appeals was denied on June 21, 1978 (App. B).

THE QUESTION PRESENTED IS SUBSTANTIAL

The question presented in this case is whether, in the absence of any exception to the Fourth Amendment's warrant requirement, police officers may enter a dwelling without a

* Appellant remains incarcerated pursuant to this judgment, concurrently with two concurrent fifteen year to life sentences imposed by the Appellate Division, Second Department, (modifying the two concurrent twenty-five year to life sentences imposed by the Supreme Court of New York, Kings County, on July 21, 1976). ___ A.D.2d ___, 2d Dept., N.Y.L.J., p. 16, col. 2, July 13, 1978.



warrant to effect the arrest of a person who is lawfully within it. The issue is posed squarely here, because the police made a warrantless arrest of appellant in an apartment in which he was legitimately present in the complete absence of any emergency and after the passage of at least two hours during which they could have obtained a warrant for his arrest. The question thus presented merits full consideration by this Court both because of its intrinsic importance and because of the sharp split of authority among state and federal courts on its proper resolution.

This Court has never decided whether warrants are required for arrests in the home, but has recognized the substantial nature of the issue by reserving it in a number of recent cases in which it was not precisely presented. See United States v. Santana, 427 U.S. 38 (1976); id. at 45 (Marshall, J., dissenting); United States v. Watson, 423 U.S. 411, 418 n. 6 (1976); Gerstein v. Pugh, 420 U.S. 103, 113 n. 13 (1975); Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971); Jones v. United States, 357 U.S. 493, 499-500 (1958). The issue is important because it involves the two fundamental interests protected by the Fourth Amendment, privacy of the home and security of the person. In all other Fourth Amendment cases involving intrusions on the privacy of the home, this Court has held the intrusion to be strictly regulated by the warrant requirement. Nonetheless, the New York Supreme Court, Appellate Division, relying upon C.P.L. §140.15(4), New York's warrantless arrest statute, affirmed the trial court's ruling that the forcible, warrantless entry by the police to seize appellant was proper. This interpretation of the Fourth Amendment thus affords more protection to the citizen against unreasonable invasions of his home to seize his property than it affords against invasions to seize his very person. Because of the anomaly in this construction of the Fourth Amendment, and because of the fundamental interests at stake, this case deserves plenary review.

The decision of the Appellate Division is in conflict with the holdings of most courts, both state and federal, which have considered this question. Most significantly, that court's decision conflicts with the decision of the Court of Appeals for the Second Circuit in United States v. Reed, 572 F.2d 412 (2nd Cir. 1978) holding that warrants are required, absent exigent circumstances, for felony arrests in the home. Such nonuniformity of Fourth Amendment rulings by the federal and state courts in New York has obvious undesirable effects on the administration of justice and requires resolution. Mincey v. Arizona, 98 S. Ct. 2408, 2419 (Marshall, J., concurring).

The Appellate Division's decision conflicts not only with the holding of the Second Circuit, but also with the holdings of all but one other circuit to have considered the question. In the leading case, the District of Columbia Circuit held that warrants were necessary for home arrests, Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970), and subsequently, four other circuits have followed. Vance v. North Carolina, 432 F.2d 984, 990-91 (4th Cir. 1970); United States v. Shye, 492 F.2d 886, 891-93 (6th Cir. 1974); Salvador v. United States, 505 F.2d 1348, 1351-52 (8th Cir. 1974); United States v. Phillips, 497 F.2d 1131, 1135 (9th Cir. 1974). Only the Seventh Circuit has held to the contrary. United States ex rel. Wright v. Woods, 432 F.2d 1143 (7th Cir. 1970), cert. denied, 401 U.S. 966 (1971).

Among state courts, too, the larger number to have considered the question have taken the position that warrants are required for arrests in the home. See State v. Cook, 115 Ariz. 188, 564 P.2d 877 (1977); People v. Ramey, 16 Cal. 3d 263, 545 P.2d 1333, 127 Cal.Rptr. 629 (In Banc), cert. denied, 429 U.S. 929 (1976); People v. Moreno, 176 Colo. 488, 491 P.2d 575 (1971); Commonwealth v. Forde, 367 Mass. 798, 329 N.E.2d 717 (1975); Laasch v. State, ___ Wis. ___, 23 Cr. L.



Rep. 2404 (August 9, 1978); but see, State v. Perez, 277 So. 2d 778 (Fla.), cert. denied, 414 U.S. 1064 (1973); People v. Eddington, 23 Mich. App. 210, 173 N.W.2d 686 (1970), aff'd, 387 Mich. 551, 198 N.W.2d 297 (1972); People v. Payton, 45 N.Y.2d 300 (1978). Of course, a large number of states, like New York, have statutes which authorize warrantless arrests in the home. See ALI Model Code of Pre-Arraignment Procedure, Appendix XI at 696 (1975). Although the Appellate Division and the New York Court of Appeals [in People v. Payton, 45 N.Y.2d 300 (1978)] have upheld the validity of this statute, the constitutionality of the statute and the similar ones in other states remains in doubt due to the substantial body of case law to the contrary. Accordingly, the question of the validity of the New York statute which authorizes warrantless arrests within a dwelling is of substantial constitutional dimension and should be granted plenary review.

## CONCLUSION

FOR THE ABOVE REASONS, THE QUESTION PRESENTED IS SUBSTANTIAL, MERITING REVIEW.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
Counsel for Appellant

BRENT K. OLSSON
Of Counsel
September, 1978

of the State of New York, Second Judicial Department,
held in Kings County on May 8, 1978

HON. J. IRWIN SHAPIRO, Justice Presiding
HON. JOHN P. COHALAN, JR.,
HON. CHARLES MARGETT,
HON. FRANK D. O'CONNOR, } *Associate Justices*

The People of the State of New York,

Respondent,

v.

Federico Gonzalez,

Appellant

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named Federico Gonzalez,

defendant in this action, having appealed to this court from a judgment of the Supreme

Court, Kings County, rendered July 30, 1975;

and the said appeal having been argued by Diana Budzanoski,

Esq., of counsel for the appellant, and argued by Peter Weinstein, Esq.,

of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed (see CPL 140.15, subd. 4, 120.80, subd. 5).

Enter:

IRVING H. SAXON

Clerk of the Appellate Division

APPENDIX A

B/mc

AD2d

A - April 24, 1978

866 E The People, etc., respondent,
v Federico Gonzalez, appellant.

Martin Erdmann and William E. Hellerstein, New York, N.Y. (Brent Olsson and Diana Budzanoski of counsel), for appellant.

Eugene Gold, District Attorney, Brooklyn, N.Y. (Peter Weinstein of counsel), for respondent.

Judgment of the Supreme Court, Kings County (D'AMARO, J.), rendered July 30, 1975, affirmed (see CPL 140.15, subd. 4, 120.80, subd. 5).

SHAPIRO, J.P., COHALAN, MARGETT and O'CONNOR, JJ., concur.

May 8, 1978 PEOPLE v GONZALEZ, FEDERICO 866 E

[illegible] COUNSEL IS REQUIRED TO NOTIFY [illegible] IMMEDIATELY OF THE DISPOSITION [illegible]

APPENDIX A-2

# State of New York
# Court of Appeals

BEFORE: HON. CHARLES D. BREITEL, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

against

FEDERICO GONZALEZ,
Defendant-Appellant.

CERTIFICATE DENYING LEAVE

I, CHARLES D. BREITEL, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
June 21, 1978

Charles D. Breitel
Chief Judge

William E. Hellerstein, Esq.
Legal Aid Society
15 Park Row
New York, New York 10038

Hon. Eugene Gold
District Attorney, Kings County
400 Municipal Bldg.
Brooklyn, New York 11201

Clerk, Court of Appeals

*Description of Order: 5-8-75 App Div 2 affmd. 7-30-75 Sup. Ct., Kings Co.

APPENDIX B

FORM 81

MEMORANDUM

SUPREME COURT KINGS COUNTY (CRIMINAL TERM, PART 26)

PEOPLE OF THE STATE OF NEW YORK

vs.

ANTHONY LUGO and FEDERICO GONZALEZ

By D'AMARO J.

Dated May 19, 1975

Indictment No. 11682/1972

Defendants moved to suppress the use of one-half kilogram of cocaine as evidence on the trial of their indictment for criminal sale of a dangerous drug in the first degree and other related charges. At the hearing on this motion, held on April 8, 9, and 10, 1975, the defendants did not testify, nor did they produce any witnesses.

The cumulative testimony of the People's witnesses, Officer Keller, one of the arresting officers, and Officer Rodriguez, the undercover agent, elicited the following facts.

Findings of Fact

On December 13, 1972, an undercover police officer made contact with one Julio Tables for the purchase of approximately one-half kilogram of cocaine for the sum of approximately $10,000.

The aforesaid Tables was previously known to the undercover police officer from whom he had made previous purchases of narcotic drugs. The undercover police officer was under constant observation by members of a back-up team to whom he periodically made reports as to the progress of the operation during the course of that day. The undercover police officer was given $10,000 and wired to transmit conversations to the back-up team.

APPENDIX C

During a second meeting that day the undercover officer and Tables were joined by one Carlotta Burgess. They proceeded to drive around while being followed by the back-up team, and finally went into a bar. They subsequently came out and went into 17 Woodhall Street at approximately 9:00 p.m. The undercover officer there met the defendants herein and a quantity of cocaine was shown to the officer. He advised them that he wanted more than the amount shown to him. Price was discussed, and it was agreed that the officer would return later with the money.

The officer then conferred with the back-up team and advised them of all of the foregoing. He then returned to 17 Woodhall Street at approximately 12:15 a.m. on December 14, 1972, wired for transmission and followed by the back-up team. While in the apartment he weighed the cocaine and then said he would have to return to his car to get the money. He was accompanied by Tables. He took a package from his car, and as he was returning to the building, upon a pre-arranged signal, the back-up team started to close in. The undercover officer struggled with Tables and fired a shot. Within 30 seconds thereafter the back-up team entered the building. He advised them that the "stuff" was still up in the apartment and the others were still there. The officers raced upstairs and announced through the closed door of the apartment that they were the police. They then proceeded to break the door down with a sledge hammer. Upon entering the apartment they observed the defendant Gonzalez flushing the cocaine down the toilet. In another room they found the defendant Lugo and a quantity of white substance in a tin foil near the bed.





## Conclusions

The fundamental issue on the question of suppression of evidence is the legality of its seizure, which in turn depends upon the existence of probable cause for the arrest to which the seizure is incidental. Was the arresting officer, Keller, in possession of sufficient information (supplied to him principally by his superior officers and the undercover police officer, Rodriguez) to have acted upon more than mere suspicion AND UPON PROBABLE CAUSE when he, and the other arresting officers, broke into defendants' apartment, arrested the defendants, and seized the cocaine.

This court must reply in the affirmative.

The fact that Officer Keller did not personally observe the "buy," or the cocaine, is not requisite to his determination that he had probable cause to arrest.

Although hearsay as to Keller, the knowledge imparted to him through his brother officer Rodriguez and the radio communications of his superiors was collectively sufficient for him to conclude that the crime had been committed and that the defendants and the contraband were within the apartment designated (see People v. Coffey, 12 N Y 2d 443, and People v. Horowitz, 21 N Y 2d 55).

The testimony of Rodriguez clearly supported the veracity of the information supplied to Keller. He actually participated in the arrangements to buy the cocaine, actually observed the defendants, their apartment, and the cocaine. Accordingly, the tests of sufficiency, dependability, and accuracy of the information

upon which Keller and the other arresting officers made the arrest and seizure, were amply met.

The final matter to be disposed of relates to the entry into the apartment and seizure of the cocaine without a warrant.

There is ample authority to support the proposition that, in order to prevent the destruction of contraband, the forced entry into defendants' dwelling is appropriate and lawful (People v. Floyd, 26 N Y 2d 558; U.S. v. Rabinowitz, 339 U.S. 56). In view of the clear and convincing weight of the testimony elicited by the People at the hearing, and the principles of law enunciated herein, the motion to suppress the evidence obtained by the police is hereby denied. This decision constitutes the order of the court.

Robert R. Lewis

J. S. C.



APPENDIX C-4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

| | |
|---|---|
| THE PEOPLE OF THE STATE OF NEW YORK, Respondent, -against- FEDERICO GONZALEZ, Appellant. | NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES<br>IND. NO. 11682/72 |

S I R S :

PLEASE TAKE NOTICE that FEDERICO GONZALEZ, the abovenamed appellant, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of New York, Appellate Division, Second Department, entered on May 8, 1978, affirming a judgment of the Supreme Court, Kings County, rendered on July 30, 1975, convicting appellant of the crime of criminal possession of a dangerous drug in the third degree [formerly P.L. 6220.10], and sentencing him to an indeterminate period of imprisonment with a maximum of five years.

This appeal is taken pursuant to 28U.S.C. §1257(2).

Dated: New York, New York
September 14, 1978

Yours, etc.,

WILLIAM E. HELLERSTEIN
BRENT K. OLSSON
Attorneys for Appellant
15 Park Row - 18th Floor
New York, New York 10038
[212] 577-3420

TO:- HON. EUGENE GOLD
District Attorney, Kings County
Attn: A.D.A. Peter Weinstein
400 Municipal Building
Brooklyn, New York 11201

CLERK
Supreme Court, Kings County
360 Adams Street
Brooklyn, New York 11201

APPENDIX D